FH [redacted]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Winnebago County Department of Human Services,
Petitioner

v.

[redacted], formerly [redacted],
Respondent

DECISION

FOF/171479

PRELIMINARY RECITALS

Pursuant to a petition filed January 15, 2016, under Wis. Admin. Code §HA 3.03, and see, 7 C.F.R. § 273.16, to review a decision by the Winnebago County Department of Human Services to disqualify [redacted] from receiving FoodShare benefits (FS) for a period of one year , a hearing was held on March 01, 2016, at Oshkosh, Wisconsin.

The issue for determination is whether the Respondent committed an Intentional Program Violation (IPV).

NOTE: The agency indicated that since it completed its investigation into this matter, that the Respondent has gotten married and changed her name from Edwards to Prieto.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703
By: [redacted]
Winnebago County Department of Human Services
220 Washington Ave.
PO Box 2187
Oshkosh, WI 54903-2187

Respondent:

[redacted], formerly [redacted]
[redacted]
[redacted]

ADMINISTRATIVE LAW JUDGE:
Mayumi M. Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. Respondent (CARES # [redacted]) is a resident of Winnebago County who received FoodShare benefits from March 1, 2013 through June 30, 2014. (Exhibit 3)

2. On January 21, 2013, the Respondent completed an application in which she indicated that she lived at an address on [redacted] with her child. The Respondent listed no other adults in her household, but named [redacted] as the absent parent. (Exhibit 5)

3. On January 22, 2013, the agency sent the Respondent a copy of the application summary, because she indicated that she wanted to complete it by mail. On February 26, 2013, the Respondent signed the application page, indicating that the information on the summary was correct; that she read and understood her rights and responsibilities under the FoodShare program, and that she understood the penalties for giving false information or breaking the rules, although the application did not contain the standard penalty warning. (Exhibit 5)

4. On January 25, 2016, the agency sent the Respondent an Administrative Disqualification Hearing notice alleging that the Respondent committed an intentional program violation between March 2013 and June 2014, by failing to report [redacted] in her household. (Exhibit 1)

DISCUSSION

Respondent's Non-appearance

The Respondent did not appear for this hearing. This circumstance is governed by the regulation in 7 C.F.R. §273.16(e)(4), which states in part:

> If the household member or its representative cannot be located or fails to appear at a hearing initiated by the State agency without good cause, the hearing shall be conducted without the household member being represented. ***Even though the household member is not represented, the hearing official is required to carefully consider the evidence and determine if intentional Program violation was committed based on clear and convincing evidence.*** If the household member is found to have committed an intentional program violation but a hearing official later determines that the household member or representative had good cause for not appearing, the previous decision shall no longer remain valid and the State agency shall conduct a new hearing. The hearing official who originally ruled on the case may conduct a new hearing. In instances where the good cause for failure to appear is based upon a showing of nonreceipt of the hearing notice, the household member has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. In all other instances, *the household member has 10 days from the date of the scheduled hearing to present reasons indicating a good cause for failure to appear. A hearing official must enter the good cause decision into the record.*
>
> *Emphasis added*

The hearing in this case took place on March 1, 2016. The Respondent was advised of the date and time of the hearing, in an Administrative Disqualification Hearing Notice that was sent to her at an address on [redacted]. The notice further directed the Respondent to call ALJ Ishii with a phone number where she could be reached. [redacted] indicated that this was the Respondent's last known mailing address and that the agency did not receive any returned mail.

The Respondent did not provide a phone number where she could be reached at the time of the hearing. An attempt was made to reach the Respondent at a number listed in the file [redacted], which lead to

a voicemail. A message was left for the Respondent and then the hearing then proceeded in the Respondent's absence.

The Respondent did not contact the Division of Hearings and Appeals within ten days of the hearing to explain her absence. Accordingly, it is found that she did not have good cause for her failure to appear.

The Definition of an Intentional Program Violation

An intentional program violation of the FoodShare program occurs when a recipient intentionally does the following:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts; or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

7 C.F.R. § 273.16(c); *see also* Wis. Stat. §§ 946.92(2).

The Department's written policy restates federal law, below:

3.14.1 IPV Disqualification
7 CFR 273.16
A person commits an Intentional Program Violation (IPV) when s/he intentionally:
1. makes a false or misleading statement, or misrepresents, conceals or withholds facts; or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

An IPV may be determined by the following means:

1. Federal, state, or local court order,
2. Administrative Disqualification Hearing (ADH) decision,
3. Pre-charge or pretrial diversion agreement initiated by a local district attorney and signed by the FoodShare recipient in accordance with federal requirements, or
4. Waiver of the right to an ADH signed by the FoodShare recipient in accordance with federal requirements.

FoodShare Wisconsin Handbook, §3.14.1.

The agency may disqualify only the individual who either has been found to have committed the IPV or has signed a waiver or consent agreement, and not the entire household. If disqualified, an individual will be ineligible to participate in the FS program for one year for the first violation, two years for the second violation, and permanently for the third violation. However, any remaining household members must agree to make restitution within 30 days of the date of mailing a written demand letter, or their monthly allotment will be reduced. 7 C.F.R. §273.16(b).

What is the County Agency's Burden of Proof?

In order for the agency to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit an intentional program violation per 7 C.F.R. §273.16(e)(6).

"Clear and convincing evidence" is an intermediate standard of proof which is more than the "preponderance of the evidence" used in most civil cases and less than the "beyond a reasonable doubt" standard used in criminal cases.

In Kuehn v. Kuehn, 11 Wis.2d 15, 26 (1959), the court held that:

> Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. In criminal cases, while not normally stated in terms of preponderance, the necessary certitude is universally stated as being beyond a reasonable doubt.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

> Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that "yes" should be the answer because of its greater weight and clear convincing power. "Reasonable certainty" means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the "middle burden." The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that "it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable." 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992.

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence, a firm conviction as to the existence of each of the two elements even though there may exist a reasonable doubt that the elements have been proven.

The Merits of the County Agency's Case

In the case at hand, the county agency asserts that the Respondent committed an intentional program violation between March 1, 2013 and June 20, 2014, by providing false or misleading information about her household composition/income in order to receive more FoodShare benefits than she was entitled to. Specifically, it is alleged that [redacted] is the father of Respondent's children; that the Respondent and [redacted] lived together at an address on [redacted] between March 2013 and July 2013; that they lived together at an address on [redacted] from July 2013 to June 2014; and that the Respondent failed to report [redacted] being in her home during the time in question.

In order to prove its case the agency must have proof of the following:

A. That the Respondent and [redacted] have a child in common.

The application summary that the Respondent signed in February 2013 reported [redacted] as the absent parent of her child.

B. That the Respondent lived at the [redacted] address between March 2013 and July 2013

The application summary that the Respondent signed in February 2013, establishes that the Respondent was living at the [redacted] address as of that date.

C. That [redacted] lived at the [redacted] address between March 2013 and July 2013.

In order to prove that [redacted] was living at the [redacted] address, the agency relied upon the verbal hearsay statements of a number of individuals to [redacted], an Investigator with [redacted] who did not verify their identities or get most of their last names. Such hearsay is not reliable and must be disregarded. (See Exhibit 7)

The agency provided an e-mail string between [redacted], another employee of [redacted] and Respondent in May 2014, but there is no clear indication of where the [redacted] was living at any specific time, or whether he was living with the Respondent between March 2013 and July 2013. (See Exhibit 8)

The only other documentation the agency provided is a Department of Transportation (DOT) Public Abstract Request System printout generated in May 2014. While it does show that the [redacted]'s primary address is listed as being on [redacted], there is no indication of when that information was reported nor where it came from, and there is nothing about the vehicles registered to [redacted] that would indicate how current the information was. It should be noted that the report was generated almost 10 months after the agency asserts that [redacted] and the Respondent moved away from the [redacted] address. As such, it is not sufficient to establish where [redacted] was living between March 1, 2013 and July 2013.

Based upon the foregoing, it is found that the agency has not established, by clear and convincing evidence, that [redacted] was living at the [redacted] address between March 1, 2013 and July 2013. Consequently, the IPV for this period of time cannot be upheld.

D. That the Respondent lived at the [redacted] address between July 2013 and June 2014.

[redacted] testified that he spoke to the Respondent at the [redacted] address on May 7, 2014. [redacted] testified the Respondent told him that she had been living at the address since June 2013. The Respondent's statements to [redacted] are reliable as statements of a party opponent and establish that she was living at the [redacted] address at least through May 7, 2014.

E. That [redacted] was also living at the [redacted] address between July 2013 and June 2014.

The agency has not provided any evidence, other than the verbal hearsay statements of various individuals to [redacted], to establish that [redacted] lived at the [redacted] Address. None of the documents provided affirmatively establish where [redacted] was living between March 1, 2013 and June 30, 2014.

I note that the May 2014 e-mail that is the subject of Exhibit 8 indicates the Respondent's intent to have [redacted] move into her home sometime, "between May 15th and June 1st", but there is no evidence that this actually happened.

Based upon the foregoing, the agency has not met its burden to prove, by clear and convincing evidence, that [redacted] lived at the same address as the Respondent between July 2013 and June 2014. As such, the IPV for that period of time cannot be upheld.

F. That when the Respondent completed his application / renewals / SMRFs, during the time in question, she did not report [redacted] in her home.

The only such document that the agency provided was an application signed in February 2013. It did not provide a May/June 2013 SMRF; it did not provide a January 2014 renewal, nor a May/June 2014 SMRF, if there were any. The agency did not provide any case comments encompassing the entire time in question. Consequently, there is no way to know what the Respondent reported after the renewal she signed in February 2013, and no way to know whether she provided false information during the entire time in question.

It should be noted that if even if [redacted] moved into the home, in between the February 2013 renewal and the following SMRF, the Respondent would not have had to report that change in household composition until the next renewal/SMRF, unless the household income went over 130% of FPL. *See FoodShare Wisconsin Handbook §6.1.1.2* The agency has provided no evidence of the household income; no Employer Verification of Earnings Forms, no paystubs, no Work Number printout, to prove what income the household received.

Because the agency did not provide any reliable evidence to prove where [redacted] was living during the time in question and because the agency did not provide all of the applications, SMRFS and case comments for the period in question, to show what the Respondent did or did not report, it is found that the agency has not met its burden to prove, by clear and convincing evidence, that the Respondent committed an intentional program violation by not reporting [redacted] in her home.

I note that the agency included a Hearings and Appeals decision in a FoodShare overpayment case that involved the Respondent and that the ALJ discussed some of the same questions of fact, such as whether she and [redacted] were living together. However, the appeal was dismissed as untimely, it was not dismissed on the merits. Even if the appeal had been dismissed on the merits, the burden of proof is lower in overpayment hearings than it is in IPV hearings.

The burden of proof in an overpayment hearing is proof by a preponderance of the credible evidence. If one were to analogize the burdens of proof to points around a race track where the finish line is the beyond a reasonable doubt standard used in criminal cases, the agency would have to make it slightly past the halfway mark, to meet a preponderance of the credible evidence standard. As discussed above, the burden of proof at an IPV hearing is by clear and convincing evidence. That means the agency needs to make it around at least 75% of the track. Consequently, a finding of fact in an overpayment hearing may not be used as the sole basis for a finding of fact in an IPV hearing, since the IPV hearing requires more / better evidence.

CONCLUSIONS OF LAW

The agency has not met its burden to prove the Petitioner committed an IPV between March 1, 2013 and June 30, 2014 by failing to report [redacted] in her home.

THEREFORE, it is **ORDERED**

IPV case number [redacted] is hereby reversed.

REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee, Wisconsin, this 15th day of March, 2016.

\sMayumi M. Ishii
Administrative Law Judge
Division of Hearings and Appeals

State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on March 15, 2016.

Winnebago County Department of Human Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
[redacted]@co.winnebago.wi.us